

Supreme Court, U. S.

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In the  
**Supreme Court of the United States**

**OCTOBER TERM, 1976**

No. **76-564** ▲

**E. L. MARKHAM JR.,**

*Petitioner,*

*v.*

**UNITED STATES OF AMERICA,**

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI**

**To the United States Court of Appeals  
for the Fifth Circuit**

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Petitioner, E. L. MARKHAM JR., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered August 18, 1976, affirming his conviction under 18 U.S.C. §1001, and that on hearing the judgment of conviction be reversed.

**OPINIONS BELOW**

The opinion of the Fifth Circuit Court of Appeals (Appendix 1) is not yet reported.

An opinion of the District Court denying defendant's Motion for a New Trial (Appendix 2) is not reported in Federal Supplement.

## JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on August 18, 1976. Timely Motion for Rehearing was filed, and was denied on September 22, 1976. This Court has jurisdiction under 28 U.S.C., §1254(1).

The Courts below decided and applied law on Federal questions in conflict with applicable decisions of this Court. The trial court also so far departed from the accepted and normal course of judicial proceedings in contravention of defendant's Constitutional rights, and was sanctioned therein by the Fifth Circuit Court of Appeals, as to call for an exercise of this Court's power of supervision. Supreme Court Rules 19(b).

## QUESTIONS PRESENTED

**1.** Whether the trial court erred, in a trial conducted in September, 1975, in peremptorily refusing to apply Rule 704 of the Federal Rules of Evidence — allowing opinion evidence upon an ultimate issue of fact — said Federal Rules of Evidence becoming effective July 31, 1975, thereby critically injuring the defendant's cross-examination right of confronting the witness against him in violation of the Sixth Amendment and the defendant's fundamental right of due process in violation of the Fifth Amendment.

**2.** Whether the trial court erred in limiting cross-examination of defense counsel of an essential government witness, Orlando F. Klein, thereby infringing the defendant's right of confronting the witness against him in violation of the Sixth Amendment.

**3.** Whether the trial court erred in denying defendant's motion to dismiss the indictment, which was fatally defective, both in being so vague that it failed to apprise the defendant of the nature and cause of the accusation against him, and also because of a mortal variance between the pleading, which charged concealment, and the proof, which concerned falsity.

**4.** Whether the trial court erred in denying defendant's Motion for Judgment of Acquittal, in that the government failed to meet the applicable standard of proof which required the prosecution to negative every reasonable hypothesis of innocence.

**5.** Whether the provision of 18 U.S.C. § 1001, namely that, "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly or willfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact," the single count under which defendant was tried, so violated the principle of legality as to be void for vagueness under general constitutional due process standards.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### *Fifth Amendment*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

### *Sixth Amendment*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

**28 U.S.C. §704 — Federal Rules of Evidence**

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it relates to an ultimate issue to be decided by the trier of fact."

**Supreme Court Rules 19(b)**

"Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

**18 U.S.C. 1001**

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

**28 U.S.C. 1254(1)**

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

**Federal Rules of Criminal Procedure 21 (6)**

"(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

**Public Law 93-595, Section 1; Federal Rules of Evidence**

"Effective Date and Application of Rules. Section 1 of Pub. L. 93-595 provided in part: "That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act (Jan. , 1975). These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply."

**STATEMENT OF THE CASE**

The indictment, returned on May 22, 1975, charged the Petitioner, E. L. Markham Jr., with a single count offense under 18 U.S.C. § 1001 and alleged that, from June of 1970 until October, 1973, he, "concealed and covered up by a trick, scheme, and device material facts" involved in a patent application concerning a building construction system. The gist of the charge was that Markham endeavored to conceal from the patent office the real inventor of some of the components of the process for which he sought a patent. Petitioner had been indicted on December 4, 1974, in the United States District Court for the Eastern District of Virginia on three counts of violation of 18 U.S.C. § 1001, on essentially the same charge.

Upon defendant's motion, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, the case was transferred to the United States District Court for the Northern District of Texas, Dallas Division, on January 3, 1975. The

defense thereupon moved to dismiss the indictment; the court did so as to Count III, but upheld Counts I and II. On March 10, 1975, a week before trial was scheduled, the court granted the government's motion for an indefinite continuance in order to obtain a superseding indictment, the one on which defendant was tried. To this indictment (Appendix 3) he pleaded not guilty on June 6, 1975. On July 29, 1975, defendant moved to dismiss the remaining two counts of the original indictment and also the superseding single count indictment; the court did so as to the former, but denied the latter.

The trial, before the Honorable Sarah T. Hughes, commenced on September 8, 1975. At the conclusion of the government's case on September, 10, 1975, the defense moved for a judgment of acquittal which was summarily denied. T. 445. Thereupon the defense rested and renewed the Motion for a Judgment of Acquittal. The Court reserved ruling on the Motion pending the jury verdict T. 446-447. Later that day the jury returned a verdict of guilty. On September 11, the Court, after hearing argument, again denied the defendant's motion for judgment of acquittal T. 497. Subsequently Markham filed a Motion for New Trial which the Court denied on September 14, 1975. On October 2, 1975, Markham was sentenced to two years probation and fined Five Thousand Dollars (\$5,000.00).

From this, defendant appealed. The case was heard by a Fifth Circuit panel consisting of Judges Gewin, Godbold and Simpson, and conviction affirmed on August 18, 1976. Petition for Rehearing was filed and duly denied on September 22, 1976, from which this Petition for Certiorari is taken.

The facts, prolix and prolonged, are essentially these. In 1957 Orlando F. Klein, the chief complainant in the case, patented a building construction process. Appellant invested in this process and was assignee of an interest therein. Because of insufficient funding, the process never reached commercial fruition.

Between 1963 and 1969 Klein developed another building process called Drycore, which in effect endeavored to provide

a complete, integrated and economical heating and cooling system embracing an entire building. In September, 1969, Klein employed Markham as his attorney in relation thereto, primarily to incorporate Drycore.

Shortly thereafter, in the same month, the attorney/client relationship between Klein and Markham was severed, and severed acrimoniously. Meanwhile Klein's relations with his Drycore investors and erstwhile franchisees deteriorated, primarily because of his inaction in marketing his process, his failure to incorporate as he had promised, and his misrepresentations that Drycore had patents pending, when actually only the 1957 patent had gone through any of the requisite legal patent processes.

In this context several disgruntled investors, including Edris Roberts, Billy J. Shipley and Henry Crowson, began dealing with Markham in order to try and save their investment. To this end they formed a new corporation, Dry-Therm, with Petitioner as President. Shortly thereafter Roberts and Shipley assigned to Dry-Therm the rights sold them by Klein under franchise agreements, and Markham assigned Dry-Therm his rights under the 1957 patent. To implement their interest a model house, based thereon, was built in Houston.

Collaterally, to prevent the very real possibility of having much of the process pass into the public domain and hence become unpatentable, the parties sought to commence the steps needed for patenting. For this purpose they undertook legal professional consultation, from 1970 through 1973, with Howard Moore and Gerald Crutsinger, Dallas patent attorneys. In May, 1970, the patent application, as prepared by Crutsinger and Moore, was finalized. Shipley signed and Roberts refused to sign the oath involved, which stipulated that they were the original inventors of the improvements or subject matter claimed in the application. Markham, as President of Dry-Therm, signed on oath that he believed that they were the inventors of the improvements involved as set forth in the application for patent.

In reaction, Klein erupted. He began a fusillade of protests, barraging the Patent Office with complaints and taking Appellant to an extensive inquiry by the Grievance Committee of the Fifth District of the State Bar of Texas. In response to Patent Office inquiries of April, 1971, both Markham and patent attorney Moore filed affidavits; the gist of Markham's was to the effect that prompt action was essential to overcome prior inaction and protect the corporation's assigned rights.

Later in September, 1971, Shipley and Roberts filed disclaimers of inventorship. On March 11, 1972, patent attorney Moore wrote the Patent Office stating that the two had re-entered Klein's employ, thus abandoning Dry-Therm, and hence he was requesting the patent office to return the application to the examining procedure. The Patent Office complied, but first required a further affidavit from Markham stating his continuing belief that Roberts and Shipley were the inventors of the improvements. The matter was finally dropped in 1973 and no patent concerning the process has ever been issued.

#### REASONS FOR GRANTING THE WRIT

1. The essence of this case turns upon the willful concealment of a material fact in a patent application. The essence of this in turn depends upon the defendant's state of mind. Defendant was deprived of the opportunity to present crucial evidence on this point by the trial court's abuse of discretion in unduly and even arbitrarily limiting the scope of defense cross-examination of Mr. Gerald Crutsinger, Dallas patent attorney and key prosecution witness.

Most crucially the court failed to follow the law itself. In the cross-examination of witness Crutsinger, the main participant in the preparation of the patent application, the record reads:

Question: "Now, is the patent application so that it is to be read and understood by someone skilled in the art?"

Answer: "Yes."

Question: "Now, you met with Mr. Markham on a number of occasions did you not, sir?"

Answer: "Yes."

Question: "Did you find him not to be skilled in the art, sir?"

Answer: "I really don't know how skilled he is."

Mr. Koch. "I am going to object Your Honor, he is asking for an opinion."

The Court: "I sustain the objection."

Mr. Daniel: "I think under the new rules that the opinion would be admissible, the new rules of evidence."

The Court: "I have sustained the objection."

Mr. Daniel: "All right."

Question (by Mr. Daniel) "But you never went through the patent application with Mr. Markham, is that correct, sir, to explain the claims?"

Answer: "I don't recall going through the claims with him, no."

Question: "And Mr. Markham did not provide any of the technical information which went into the patent application?"

Mr. Koch: "We are going to object, Your Honor. He is leading the witness."

The Court: "I sustain the objection."

T. 363-364.

Soon thereafter the issue was renewed:

Mr. Daniel: "I have a question I would like to pose, and Mr. Koch objected to it yesterday, and I would like to direct Your Honor's attention to a legal point that's involved here."

The Court: "Ask the question again, then address the legal point to me from where you are."

Mr. Daniel: "All right."

Question: (by Mr. Daniel) "The question is this: Did you in in any of those conferences with Mr. Markham and in your discussions advising him with respect to the filing of these affidavits find any evidence to, by trick, scheme, or device, to withhold information from the Patent Office?"

Mr. Koch: "We are going to object, Judge. He is asking for an opinion."

Mr. Daniel: "Yes, Your Honor, I am, and I would like to direct Your Honor's attention to Rule 704 of the new Rules of Evidence which are now applicable to the trial of this case and which Rule has been changed and says, "The testimony in the form of an opinion or inference otherwise admissible is not objectionable because it relates to an ultimate issue . . . to be decided by the trier of fact.

"Now the ultimate issue here is . . ."

The Court: "I know what the ultimate issue is, and I sustain the objection." T. 380-81.

Rule 704 of the Federal Rules of Evidence states:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it relates to an ultimate issue to be decided by the trier of fact." Public Law, 93-595, January 2, 1975, 88 Statute 1937; 28 U.S.C. § 512.

Mr. Crutsinger was fully, even uniquely, qualified to express an opinion. He and Mr. Howard Moore supervised the patent application, T. 307, and conducted all the essential steps of its preparation, T. 330, 349-351. One of Appellant's main trial defenses was good faith reliance on advice of counsel, a defense curtly denied him by the trial court.

The court, without even so much as a speck of endeavor to assess the merits of the issue, ignored the law. The Federal Rules of Evidence became effective July 31, 1975, 180 days after enactment on January 2, 1975, and specifically stated in the preamble:

"These rules also apply to further procedure in actions, cases and proceedings then pending except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply." Public Law 93-595 § 1.

Moreover, regarding Rule 704 the authoritative opinion of the advisory committee stated,

"The basic approach to opinions, lay and expert in these rules is to admit them when helpful to the trier at fact. In order to render this approach fully effective to allay any doubt on the subject, the so-called 'ultimate issue' rule is specifically abolished by the instant rule." Public Law 93-595 § 1; 28 U.S.C. § 5.

By every significant measure, the statute controls. Purpose governs interpretation, *Billik v. Berkshire*, 154 F. 2d, 493,494 (2nd Cir. 1947), and courts are under a solemn duty not to negate that purpose nor obviate Congressional goals. *New York State Department of Social Services v. Dublino*, 413 U. S. 405, 419-20, (1973). Manifest intent to change the law should be honored, *United States v. Stroop*, 109 F. 2d 891, 893-93, (6th Cir. 1940), and normally procedural changes required by new legislation are regarded as immediately applicable to pending cases. *United States v. Houghton*, 290 F. Supp. 422, 427, (W. D. Wash. 1968; Reversed 413 F. 2d 736, 9th Cir., 1969). If substantial rights of a defendant are involved, strict interpretation of penal matters and resolution of ambiguity and reasonable doubts in his favor are required. *North American Van Lines, Inc. v. United States*, 243 F. 2d. 693, 696-97 (6th Cir. 1957).

The right of cross-examination falls fully within this purview. The constitutional right of confrontation includes cross-examination and both are among the fundamental requirements of a constitutionally fair trial. *Pointer v. Texas*, 380

U. S. 400, 403-05, (1965); *Parker v. Gladden*, 385 U. S. 363, 364-66, (1966). Their significant shrinkage or denial calls into question the ultimate integrity of the fact finding process, and requires bringing any competing interest of the trial process causing that shrinkage into close examination. *Chambers v. Mississippi*, 410 U. S. 284, 295, (1973). The self mandate of this very court stipulates a duty to avoid a construction that would suppress otherwise competent evidence unless such a result is manifestly required. *St. Regis Paper Company v. United States*, 368 U. S. 208, 218, (1961).

Here the law was turned inside out. A rule that had been specifically abolished was enforced in the very teeth of the statutory stipulation that the new rules would apply to pending cases unless it would "work injustice." By this rejection, an injustice by omission was perpetrated. No competing trial interest was specified or assessed as a reason for denial, and competent relevant evidence going to the very heart of guilt or innocence was excluded. Strict interpretation was applied against the substantial rights of the defendant, procedural change in his favor denied him, and manifest congressional intent ignored.

Admittedly, overwhelming authority gives the Federal trial court wide discretion in controlling the scope of cross-examination. That discretion, however, cannot reach so far as to ignore the law itself, especially a generic statute designed to govern the production of truth in the entire Federal legal system. To do so constitutes an abuse of discretion meriting full review and calling for reversal.

It is respectfully suggested that the classic ex post facto tests of *Calder v. Bull*, 3 Dallas 386 (1798), apply. An absolute of our criminal law requires that the rules of evidence during the pendency or hearing of a case cannot be changed to the detriment of an accused. It should be an equal absolute that the benefit of the rules of evidence cannot be withheld to the detriment of an accused.

2. The defendant's rights were also injured by improper restriction of the cross-examination of Orlando K. Klein, chief complainant and star government witness in the case.

As the claimed original inventor of the process central to the case, Klein's testimony was vital to the prosecution both to prove this supposed origination of the idea and to prove through his contacts with Markham defendant's alleged requisite knowledge. Accordingly, it was vital to the defense to diminish Klein's credibility and elicit from him facts supporting defense versions of the facts.

Consistently the court constricted defendant's efforts to elicit and discredit Klein's testimony. The court deemed his motivations irrelevant, T. 119-190, even though the defense identified his numerous documents of protestation, T. 163-69, and a record of extensive adversary inquiry between Klein and Markham before the Fifth District Grievance Committee, T. 177-85, was unsuccessfully offered into evidence to show Klein's bias, T. 119, 169. The defense was, through this proffer of evidence, endeavoring to show the civil nature of the proceeding before the Patent Office, to endeavorably negate criminal intent, T. 169-73, and to destroy the materiality of the information allegedly withheld by Markham because the Patent Office had been fully informed thereof. T. 177.

In denying this proffer, the court erred. Cross-examination includes the right to show bias and prejudice and thus their bearing on credibility. *Davis v. Alaska*, 415 U. S. 308, 317, (1974). Cross-examination of witnesses in matters pertinent to credibility should be given the largest possible scope, *McConnell v. United States*, 393 F. 2d 404, 406 (5th Cir. 1968), and defendants in criminal cases are entitled to thorough and sifting cross-examination. *United States v. Dobbs*, 506 F. 2d 445, 447, (1965).

Where, as here, the bias and credibility of the main prosecution witness is not allowed to be either fully or thoroughly shown, court discretion to limit its scope does not become operative because the right has not been effectively exercised. *United States v. Greenberg*, 423 F. 2d 1106, 1108 (5th Cir. 1970). If limitation is so applied a right is therefore denied, and full consideration and reversal are therefore merited.

3. Uniquely among the circuits, the Fifth Circuit Court of Appeals utilizes the "reasonable hypothesis" rule. This

holds, in effect, that in a circumstantial evidence case the proof must be of such probative force as to lead to the evidence of guilt, and that the circumstances must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence. *McMillan v. United States*, 399 F. 2d 478, 479, (5th Cir., 1968); *United States v. Bass*, 490 F. 2d 846, 855, (5th Cir., 1974).

Although strongly urged upon the Fifth Circuit, the decisional panel bypassed the Fifth Circuit's own legal standard and overruled this appeal allegation by simply elaborately reviewing the fact situation (See Appendix 1.)

This case involved mainly circumstantial evidence and inference therefrom. Moreover, since 18 U.S.C. § 1001 is a highly penal statute, guilty knowledge cannot be inferred from general activity, particularly where much of the activity in question was handled by the defendant's attorney. *Freidus v. United States*, 223 F. 2d 598 (C.A.D.C., 1955). Because one of Appellant's main defenses was reliance upon expertise in the form of advice of patent counsel, a ground unconstitutionally restricted as heretofore urged, we respectfully request a full hearing so that the "reasonable hypothesis" standard may be reasonably and thoroughly applied to the merits of this case.

4. Throughout this trial and appeal defendant has urged the insufficiency of the indictment as a matter of law. This is urged again, if for no other reason that this constitutes the first discernible patent prosecution under 18 U.S.C. § 1001, at least since 1948.

Paragraph 8 of the indictment, the only one which begins to approach the requisite sufficiency of specificity, purports to deal with four material facts covering concealment, but cursory analysis reveals that they are only four varieties of the same fact, and as such are far too vague to apprise the defendant of the charge against him and so enable him to prepare an adequate defense. A basic rule of pleading requires that the allegations must be particularized, and not simply track the statute. *United States v. Harris*, 217 F. Supp. 86, 87 (M. D. Ga., 1962); *Russell v. United States*,

369 U. S. 749, 770, (1962). And although a bill of particulars was herein supplied, it is well settled that this will not cure an otherwise invalid indictment. (*Russell v. United States*, *supra*).

Moreover, the government by its own explicit admission failed to carry its required burden of proof. In his argument the prosecutor declared:

"I will tell you what is the business of the United States government \* \* \* when some individual lies to the government and expects to receive something for it. Now, that's the government's business. That's what this lawsuit is about, and that is all it's about." T. 445.

He returned to the same theme a moment or so later:

"I want you to consider these things. That's the purpose of that, get the jury's mind off of what it's supposed to be considering, the fact that Mr. Markham made a false statement." T. 456.

And the prosecutor concluded his opening argument by stating:

"Now, this jury is smart enough to understand this situation. It's not easy to convict a man like this, but I will tell you this, there is no question in this jury's mind that he knew what was in that, and if he knew what was in that, in those statements right there, or in those plans, he made a false statement. And, if he made a false statement, he is guilty and for that reason, and only that reason, I will ask this jury to return a guilty verdict." T. 457-58.

Thus did the government base its case on falsity, the gist of the two dismissed indictments, whereas the government charged and proceeded to trial on concealment. This constitutes a fatal variance between pleading and proof, a crucial rule here enhanced by the prosecution's own admission. *Gaither v. United States*, 413 F. 2d 1061, 1072, 1079, (C.A.D.C., 1969); *Burger v. United States*, 295 U. S. 78, 88, (1935).

Special appellate scrutiny should be exercised, since the range by which proof may vary from the indictment is much narrower in a false statement case than in many other types of prosecution. *United States v. Lambert*, 510 F. 2d 943 (5th Cir. 1974). For this reason, and because the illicitly unspecific indictment placed the Appellant in an unpreparable defense position injuring his substantive rights. *United States v. Moser*, 509 F. 2d 1089, 1092 (7th Cir., 1975) we request full review and final reversal.

5. Underlying and irradiating the whole of our legal system is the principle of legality, the cardinal commitment that the criminal law must be legitimately enacted, reasonably defined, and strictly construed. *United States v. Wiltberger*, 5 Wheat. 76, (1820). 18 U.S.C. § 1001, in its concealment provisions, substantially violates that principle.

Our constitutional law enshrines this principle, mandating that,

"fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear." *McBoyle v. United States*, 283 U. S. 25, 27, (1931).

The statute in question, in this one provision alone, stipulates two mens reas, three patterns of conduct, and three methods of implementation, each of them general in itself and with no provision whatsoever for their interrelationship. There exists no clarity, only a fine, deep gray mist constituting a vague admonition of beware that amounts to a veritable model of obfuscation.

This court well enunciated the firmament rule wherein such vagueness is involved in *Lanzetta v. New Jersey*, 306 U. S. 451, 454, (1939):

"It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression \* \* \*. No one may be required at peril of life, liberty, or property to speculate as to the meaning

of penal statutes. All are entitled to be informed as to what the statute commands or forbids \* \* \*. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first principle of due process of law."

This one portion of this one statute, with its eight components, without any guide as to their nature or relationship, and all centering about the essentially mercurial concept of concealment, perforce makes citizens of common intelligence guess as to its meaning and in that intelligence inescapably differ as to its application. As such it therefore violates the first principles of due process and thereby the Constitution of the United States. We therefore respectfully request its review, urge assessment of its vagueness, and ask determination of its unconstitutionality.

6. The Judge who tried this case eventually had real reservations about its criminality. At sentencing the trial court explicitly states, "I have considered this matter very seriously. The crime is more a civil offense than it is a criminal offense in my opinion." (Sentencing Proceedings) T. 12-13. This, together with the issues raised by this petition, merit its full review.

Moreover, the points so raised focus on basic constitutional issues. In an hour of grave constitutional crisis this very court formulated a meaningful summary of these principles:

"The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor'. Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate these guarantees, and to accomplish that it is essential that all relevant and admissible evidence be presented." *United States v. Nixon*, 418 U. S. 683, 711, (1974).

## Appendix 1

UNITED STATES v. MARKHAM

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It is respectfully requested that the meaning and spirit of this sumnit declaration of law be applied to the case at bar, that certiorari therefore be granted and hearing held, and that upon consideration of the merits this case be reversed.

**CONCLUSION**

For the foregoing reasons this Petition For Writ of Certiorari should be granted.

**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 20<sup>th</sup> day of October, 1976 mailed three copies of the foregoing Petition to each of the following counsel of record at the address indicated, by certified mail with sufficient postage prepaid:

Michael T. Carnes  
1100 Commerce St.  
Dallas, Texas 75242

I further certify that all parties required to be served have been served.

*Charles Warren Van Cleve*  
CHARLES WARREN VAN CLEVE,  
1505 Ridgeview Drive,  
Arlington, Texas 76012,

Robert H. Bork  
Solicitor General of  
The United States,  
Room 143,  
Main Justice Building,  
Washington, D.C. 20530

UNITED STATES of America,  
Plaintiff-Appellee,

v.

E. L. MARKHAM, Jr.,  
Defendant-Appellant.

No. 75-3839.

United States Court of Appeals,  
Fifth Circuit.

Aug. 18, 1976.

Defendant was convicted in the United States District Court for the Northern District of Texas, at Dallas, Sarah Tilghman Hughes, Senior District Judge, of attempting to conceal from the patent office the true inventor of a process for which a patent was sought, and he appealed. The Court of Appeals, Simpson, Circuit Judge, held, inter alia, that the indictment was sufficient to inform defendant of the charges, that evidence adduced at trial supported defendant's conviction, and that the trial court did not err in limiting defendant's counsel's cross-examination of two witnesses.

Affirmed.

**1. Indictment and Information**  $\Leftrightarrow$  117

Validity of indictment is determined from reading indictment as whole, and by practical, not technical, considerations.

**2. Fraud**  $\Leftrightarrow$  69(2)

Indictment charging that defendant attempted to conceal from patent office the true inventor of a process for which a patent was being sought was sufficient to inform defendant of crime with which he was charged and to enable him to prepare a defense. 18 U.S.C.A. § 1001; 35 U.S.C.A. § 102; Patent Office Prac-

tice Rules, rule 47(b), 35 U.S.C.A. App.; Fed.Rules Crim.Proc. rule 7(c), 18 U.S.C.A.

**3. Indictment and Information**  $\Leftrightarrow$  60, 71.2(2)

Test of sufficiency of indictment is not whether indictment might have been drawn with greater certainty and exactitude, but rather whether it set forth elements of offense charged and sufficiently apprises defendant of charges to prepare for.

**4. Fraud**  $\Leftrightarrow$  69(5)

Evidence supported defendant's conviction of attempting to conceal from patent office true inventor of process for which patent was sought. 18 U.S.C.A. § 1001.

**5. Criminal Law**  $\Leftrightarrow$  31

In order for reliance upon expert's opinion to be valid defense to criminal charges, reliance on expert must be in good faith and after full disclosure of relevant facts to such expert.

**6. Criminal Law**  $\Leftrightarrow$  1153(4)Witnesses  $\Leftrightarrow$  267

Scope of cross-examination is matter within trial court's sound discretion, and error will be found only upon showing of abuse of that discretion.

**7. Criminal Law**  $\Leftrightarrow$  1119(2)

Record in prosecution for attempting to conceal from patent office true inventor of process for which patent was sought failed to show that trial court abused its discretion in manner in which it restricted cross-examination by defendant of prosecution witnesses. 18 U.S.C.A. § 1001; Federal Rules of Evidence, rule 704, 28 U.S.C.A.

**8. Fraud**  $\Leftrightarrow$  68.10(3)

In order for there to be liability under statute prohibiting making of false

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statements or concealing facts from government agency, it is not necessary that government agency must be actually deceived; rather, it is required only that fraud in question have natural tendency to influence, or be capable of affecting or influencing, governmental function. 18 U.S.C.A. § 1001.

Appeal from the United States District Court for the Northern District of Texas.

Before GEWIN, GODBOLD and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The appellant, E. L. Markham, Jr., was convicted after jury trial under an indictment charging him in a single count with violation of Title 18, U.S.C., Section 1001. The indictment was based upon the prosecution by appellant of a patent application before the United States Patent Office, the charge being essentially that Markham attempted to conceal from the Patent Office the true inventor of the process for which a patent was sought.

Three purported errors of the trial court are urged on appeal. Markham asserts that the court erred (1) in denying defendant's motion to dismiss the indictment as facially insufficient, (2) in denying his motion for judgment of acquittal because of insufficiency of the evidence, and (3) in prejudicially limiting the scope of defense counsel's cross-examination of certain witnesses. We find each point raised to lack merit, and accordingly affirm.

## FACTS

Viewing the evidence at trial in the light most favorable to the government, *Glasser v. United States*, 1942, 315 U.S.

60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704; *United States v. Warner*, 5 Cir. 1971, 441 F.2d 821, 831, we note the following relevant facts.

In 1957 Orlando F. Klein patented a building process for construction of buildings by using corrugated asbestos panels with insulation sandwiched between them. Appellant invested in this process, and was an assignee of an interest in the patent. One house was built using this process and a second was partially completed. The project ran out of funds so that the process was never commercially exploited. Appellant and his fellow investors never received a return on their investment.

Between 1963 and 1968 Klein developed another building process he termed the "Drycore" system which differed substantially from the patented system. The new concept, simply described, called for the use of horizontally corrugated asbestos panels with insulation sandwiched between them, to be erected prior to the pouring of the slab and foundation of the building, with the asbestos panels serving as walls. Insulated heating and cooling ducts were formed, and steel reinforcing rods were set lacing through the asbestos walls throughout the area for the foundation and floors. Thus when the foundation and floor slab were poured in concrete, the walls, floor foundation, and heating and cooling ducts all became one integrated unit. The roof, constructed of the same material, was to be similarly tied to the structure by reinforcing bars and concrete, resulting in an extremely well insulated building designed to be economically and quickly built.

Between 1965 and 1969, Orlando Klein and Markham met several times to discuss the system. In 1968 Klein had an architectural firm draw up a set of

house plans utilizing the Drycore program. These plans clearly identified Klein as developer of the system by means of a printed legend. Copies of the plans were distributed in 1968 to appellant and several other persons. In January, 1969, Klein and several investors to whom he had sold franchises in the Drycore system began construction of a model home in Grand Prairie, Texas, using Klein's plans. Markham was not an investor, although he was attorney for the project, which was to be incorporated. He appeared to believe that his percentage of the prior patent gave him a similar interest in the Drycore process. The Grand Prairie house took nine months to complete rather than the anticipated 21 days. The investors, the actual builders of the house, blamed their difficulties on Klein. Markham did not see the house until it was nearly complete. At that time signs around the house prominently stated that the construction technique had been developed by Klein.

Klein and his wife went to Markham's office on September 19, 1969, to sign articles of incorporation for the Drycore project. When they saw the final documents they expressed doubts and stated their desire to obtain another legal opinion before they signed. Appellant became angry and ordered the Kleins from his office, which marked the end of their attorney/client relationship. The following day Klein wrote Markham that it was important for the process to be incorporated to avoid a "deterioration" of the total concept, which he described as "entirely foreign" to the method patented in 1957.

Klein's relationship with the investors and purported franchisees rapidly deteriorated after the Grand Prairie model home was completed. Those investors

realized that they were in danger of losing their money due to Klein's inability or refusal to take any action to market or distribute his process. Klein, aside from not having yet incorporated his project, as he had promised, had misled the investors by stating that his construction process was covered "by patents granted and pending". The only existing patent was that of 1957. Klein's concept of patent pending was merely that he had placed documents with his patent lawyer in anticipation of filing an application. Klein also failed to carry out a promise to build a model home in Houston prior to a major builder's conference there in early 1970.

Several disgruntled investors, including Messrs. Roberts, Shipley, and Crowsen, met with Markham in December 1969 to discuss means of protecting their investments. A decision was reached to construct a Houston demonstration home without Klein's participation, but using the plans and knowledge they had obtained from constructing the Grand Prairie home. The group planned also to sell franchises for the building method. To this end a corporation, "Dry-Therm", was formed, with Markham as president. Tentative plans were made to escrow a percentage of Dry-Therm profits for the Kleins. Shipley, Roberts, and Crowsen assigned to Dry-Therm the rights Klein had sold them under franchise agreements. Markham assigned to Dry-Therm his supposed interest under the old patent. Markham also furnished the major portion of the funds required to build the Houston house. This house was built, primarily by Shipley and Roberts, very quickly in January of 1970. With the exception of minor variations and innovations, the Houston house was substantially identical to the Grand Prairie model house. Appellant and Roberts

prepared an advertising brochure from the Grand Prairie plans and prior advertising material of Klein.

Klein had not filed for a patent on his building process. The investors feared they would lose their investments because one year after the completion of the Grand Prairie model home the concepts of Drycore would become prior art and a part of the public domain, and therefore unpatentable.<sup>1</sup> Markham arranged a meeting between Shipley, Roberts, Crowson, and his patent attorney, Howard Moore. Roberts, for one, asserted at trial that he understood that a patent application was to be filed on behalf of Klein, and that Moore had said such action was possible. Markham asked Roberts and Shipley whether they thought they had any patentable ideas. Each man suggested relatively small design modifications of the Klein process, and sketched these ideas for the benefit of the patent attorney. The patent attorney advised Markham that the Drycore process was distinct from the 1957 patented process, and that Markham's interest in the 1957 patent, and by contract in derivative patents, afforded him no rights in the Drycore system. After the meeting was concluded, Markham cautioned Crowson, Roberts, and Shipley to inform no one of what they had heard.

1. See Title 35, U.S.C. § 102, which provides in part that:

"A person shall be entitled to a patent unless—

\* \* \* \* \*  
(b) the invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . . ."

2. Rule 47(b) of the Rules of Practice in Patent Cases, 37 C.F.R. § 1.47(b) provides in part that:

Moore's associate, Crutsinger, prepared a patent application for the building construction method. Drawings used to illustrate the patent application were traced by the patent lawyer from the plans used for the Grand Prairie house. Shipley and Roberts were named the joint and sole inventors of all the processes disclosed, when in fact no more than part of the peripheral ideas were arguably traceable to them. Appellant remained in contact with Crutsinger during the period of preparation of the application.

In May of 1970 the patent application was completed. Shipley signed the inventor's oath, appearing to believe that all the ideas contained therein were his and Roberts. After studying a copy of the application Roberts refused to sign the oath. Despite this refusal, Markham, as president of Dry-Therm, the assignee of Shipley's and Roberts' "franchise rights" obtained from Klein, signed an oath that he believed Shipley and Roberts to be the sole and original inventors of the process.<sup>2</sup> Meanwhile Klein received a copy of the patent application from Roberts. He immediately wrote the Patent Office complaining that his invention was improperly represented within the Dry-Therm application as that of Shipley and Roberts. In December, 1970, Markham suggested to

"Whenever an inventor refuses to execute an application for patent, . . . a person to whom the inventor has assigned or agreed in writing to assign the invention or who otherwise shows sufficient proprietary interest in the matter justifying such action may make application for patent on behalf of and as agent for the inventor. Such application must be accompanied by proof of the pertinent facts and a showing that such action is necessary to preserve the rights of the parties . . . ."

Klein that he honor appellant's application, since Klein was without funds to file on his own behalf. Klein refused, and threatened suit against all parties involved in what he termed a "take-over".

On April 2, 1971, the Patent Office wrote Moore requesting a further showing of the reasons Roberts refused to sign the inventor's oath, and the necessity for the submission of appellant's affidavit in lieu thereof. Markham and Moore each submitted an affidavit in reply. Appellant stated that a demonstration home had been built almost a year prior to the filing of the patent application (the Grand Prairie house), and that prompt filing was therefore necessary to protect the rights of Dry-Therm, the assignee. He informed the Patent Office also that Roberts had been in contact with a "competitor", Orlando Klein, who had failed to carry out prior licensing agreements concerning the process. Appellant said that Klein had learned the contents of the patent, so that prompt action on the part of Dry-Therm in filing the application was essential. Markham did not mention Klein's relationship to the Grand Prairie house.

Subsequently, Shipley and Roberts on September 27, 1971, filed disclaimers with the Patent Office denying participation in the inventorship. Each asked that his name be withdrawn from the application. Following correspondence from the Patent Office, Moore wrote the Patent Office March 22, 1972, stating that Shipley and Roberts had entered the employ of Klein, and thus had abandoned Dry-Therm. He requested that the Patent Office return the application to the examining procedure. The Patent Office complied with this request, but first required a further affidavit from Markham stating his continuing belief

that Roberts and Shipley were the true inventors of the process. No patent was issued on the Dry-Therm patent application. In late 1973 it was finally abandoned. Klein had meanwhile filed his own patent on the Drycore process. The Patent Office never issued a patent on this application.

### THE INDICTMENT

Rule 7(c) of the Federal Rules of Criminal Procedure requires that the indictment set forth a "plain, concise, and definite written statement of the essential facts constituting the offense charged". The Supreme Court has recently held:

"an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense".

*Hamling v. United States*, 1974, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590, 620. The point in contention in this case is whether the indictment "fairly informs [the] defendant of the charge against which he must defend". *Russell v. United States*, 1962, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240; *United States v. Cruikshank*, 1876, 92 U.S. 542, 23 L.Ed. 588; *United States v. Smith*, 5 Cir. 1975, 523 F.2d 771; *United States v. Mann*, 5 Cir. 1975, 517 F.2d 259, cert. denied 1976, 433 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97; *United States v. Mekjian*, 5 Cir. 1975, 505 F.2d 1320.

A single count indictment, five pages in length, was filed on May 23, 1975, charging appellant with having violated Title 18, U.S.C., Section 1001, by concealing and covering up material facts relat-

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ing to a patent application filed with the United States Patent Office. The appellant considers this indictment to be factually insufficient in that it did not set forth the particulars of the offense charged.

[1] The validity of an indictment is determined from reading the indictment as a whole, *Dunbar v. United States*, 1895, 156 U.S. 185, 190, 15 S.Ct. 325, 327, 39 L.Ed. 390, 392, and the validity of the indictment must be determined by practical, not technical, considerations, *United States v. Crim*, 10 Cir. 1975, 527 F.2d 289. See further, *United States v. Smith, supra*, at 779; *United States v. Miller*, 5 Cir. 1974, 491 F.2d 638, 649, 3.

## II.

## OFFENSE CHARGED

7. Beginning on or about June 1, 1970, and continuing thereafter until on or about October 1973, the defendant MARKHAM knowingly, wilfully, and in violation of Title 18, United States Code, Section 1001, concealed and covered up by a trick, scheme and device material facts relating to the aforesaid patent application (a matter within the jurisdiction of the Patent Office, an agency of the United States).

8. In furtherance and pursuance of such violation, the defendant knew and covered up one or more material facts as set forth more particularly as follows:

(a) Defendant knew and covered up the fact that Edris Roberts and Billy J. Shipley were not the original and first inventors of all of the improvements or subject matter described and claimed in the patent application.

(b) Defendant knew and covered up the fact that Edris Roberts and Billy J. Shipley made no inventive contribution at all to some of the improvements or subject matter described and claimed in the patent application, including that covered by one or more of the following claims: 14, 17, 22 and/or 24;

(c) Defendant knew and covered up the fact that Orlando F. Klein invented, discovered, or knew of the improvements or subject matter claimed in one or more of the claims of the patent application, and Klein did so before Edris Roberts and Billy J. Shipley;

cert. denied 1975, 419 U.S. 970, 95 S.Ct. 236, 42 L.Ed.2d 186.

The first three paragraphs of the indictment set forth the history of Klein's building construction system and the circumstances under which the government alleged the appellant and Shipley and Roberts learned the details of the construction process, referring particularly to the Grand Prairie house. Paragraphs four through six contained the government's contentions as to the filing of the patent application, detailing the chronology of the sworn statements filed by Markham alleging Roberts and Shipley to be the inventors of the system.

Paragraphs 7, 8, and 9 subheaded "Offense Charged" (set forth in the margin)<sup>3</sup> contained the meat of the in-

(d) Defendant knew and covered up the fact that Edris Roberts and Billy J. Shipley had worked with Klein and learned of his invention, discovery, or knowledge or such improvements while he was instructing them in constructing the demonstration house in Grand Prairie, Texas.

9. In furtherance and pursuance of such violation, the defendant did, among other things, the following:

(a) On or about June 1, 1970, defendant caused a patent application to be filed in the Patent Office naming Roberts and Shipley as inventors, among other things, of the system Klein had taught them; and defendant did this after he had secured from Roberts and Shipley an assignment of their entire interest in the application to a corporation he controlled.

(b) On or about June 1, 1970, defendant asserted the following in a statement under oath he signed and caused to be filed with the Patent Office in regard to the aforesaid patent application:

I do verily believe the said Edris Roberts to be the original, first and joint inventor with Billy J. Shipley of the improvements in BUILDING CONSTRUCTION described and claimed in the annexed specification;

By these assertions, defendant intended to convey to the Patent Office the impression that Roberts and Shipley were the original and

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Klein, who had instructed them in his invention. These four material facts are, to a large extent, variations on the same theme. But the indictment was not fatally deficient because it broadly alleged that "one or more" of the facts material to the application were concealed, and used the term "and/or" in paragraph 8(b) in identifying the claims. See *Henslee v. United States*, 5 Cir. 1959, 262 F.2d 750, cert. denied, 359 U.S. 984, 79 S.Ct. 942, 3 L.Ed.2d 933. Read as a whole, the indictment was sufficient to inform the defendant of the crime with which he was charged, and to enable him to prepare a defense. The test is not whether the indictment might have been drawn with greater certainty and exactitude, but rather whether it set forth the elements of the offense charged and sufficiently apprized the defendant of the charges to prepare for. *United States v. Debrow*, 1953, 346 U.S. 374, 378, 74 S.Ct. 113, 115, 98 L.Ed. 92, 96. The indictment sufficiently met the applicable standards,<sup>4</sup> and no error occurred when the pre-trial Motion to Dismiss it was denied.

## SUFFICIENCY OF THE EVIDENCE

Our established standard for weighing sufficiency of the evidence on a motion for judgment of acquittal is that set forth in *United States v. Warner*, 5 Cir. 1971, 441 F.2d 821, 825:

" . . . the test is whether taking the view most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. (citing cases)."

<sup>4</sup>. The defense sought and received a bill of particulars in the instant case.

See also, *United States v. Smith*, 5 Cir. 1975, 523 F.2d 771; *United States v. Amato*, 5 Cir. 1974, 495 F.2d 545; *United States v. Edwards*, 5 Cir. 1974, 488 F.2d 1154; *United States v. Fontenot*, 5 Cir. 1974, 483 F.2d 315. Appellant centers his attack upon the charge that he "knowingly and willfully" concealed and covered up by a trick, scheme, or device material facts relating to the patent application, a matter within the jurisdiction of an agency of the United States.

[4] "Knowingly" as used in § 1001 requires that the defendant acted "with knowledge". *United States v. Smith*, *supra*; *United States v. Mekjian*, 5 Cir. 1975, 505 F.2d 1320, 1321; *McBride v. United States*, 5 Cir. 1955, 225 F.2d 249. "Willfully" means that the defendant acted "deliberately and with knowledge". *United States v. Smith*, *supra*; *United States v. Mekjian*, *supra*; *United States v. Parten*, 5 Cir. 1972, 462 F.2d 430; *McBride v. United States*, *supra*. This record supports the conclusion that the Government established Markham's *mens rea* with respect to the offense charged.

Initially, through the testimony of Klein, the Government portrayed a long term relationship of appellant with Klein during which time it was a permissible inference that Markham gained an understanding of the developing Drycore process. Significant incidents which persuasively further established this knowledge included: (a) Klein's giving Markham, in 1968, a copy of the plans from which the Grand Prairie house would be built, with the legend endorsed thereon that they were based upon Orlando Klein's Drycore method; (b) Markham's actual inspection tour of the Grand Prairie model home, which contained signs proclaiming that it was produced by Or-

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lando Klein's construction process; and (c) the letter from Klein to Markham, immediately after their argument in September 1969, stating that the Drycore process was new, unique, and different from the earlier patented process.

Shipley, Roberts, and Crowson each testified to their meeting with Markham in December 1969. This was the meeting at which the disgruntled investors assigned their rights as franchisees of the Drycore system to a new corporation, Dry-Therm, of which Markham was president. The stated initial purpose of this corporation was to protect the investors from the possibility that Klein's inaction would cause them to forfeit their investment. This group built a Houston model house, from Klein's Grand Prairie plans. Roberts testified that he, appellant and possibly Shipley and Crowson prepared an advertising brochure at this time titled "Dry-therm Insulated Homes, Inc.", patented, incorporating Drycore Construction System" from the Grand Prairie plans and a booklet prepared by Klein to advertise the Drycore process. The formation of the Dry-Therm corporation and the construction of the Houston model house, and the attendant circumstances, were sufficient basis for the jury to reasonably conclude that Markham was not only familiar with the Drycore system itself, but knew that Shipley and Roberts had obtained the knowledge they possessed from their association with Klein.

The implications from the meeting of Markham, Roberts, Shipley and Crowson with Markham's patent attorney, Moore, were a sound basis for attributing to Markham full knowledge that the heart of the new building system he attempted to patent was based on Klein's ideas. We view it as significant that Moore advised Markham that the 1957 patent af-

firmed him no rights under the new system, thus distinguishing the processes. This was followed by Markham's warning to the others present not to disclose what they had learned.

Markham's initial affidavit to the Patent Office, stating under oath his belief that Shipley and Roberts were the sole inventors of the process described, becomes damning in the light of this circumstance. His second affidavit, complying with the Patent Office's request for a further showing of the necessity for Markham's affidavit in lieu of the inventors' oath from Roberts, stated that a demonstration home had been built in Grand Prairie using the method to be patented. This inextricably tied the patent application to Klein's process and its product. While not mentioning Klein's connection with the Grand Prairie house, Markham in this affidavit termed Klein a competitor and suggested that Roberts might have leaked information of Dry-Therm's process to Klein. This evidence established the *mens rea* of appellant sufficiently to persuade a reasonably-minded jury beyond a reasonable doubt. Even after being advised by the Patent Office of Shipley's and Roberts' disclaimers of inventorship, Markham submitted an additional affidavit asserting Shipley and Roberts to be the inventors.

The jury below acted upon abundantly sufficient evidence in finding Markham guilty.

[5] His counsel argues that Markham was not a patent attorney, and relied totally and in good faith upon Moore and Crutsinger to prepare the application from the information furnished by Shipley and Roberts. Acceptance of this defense would ignore the evidence and its implications and reasonable inferences. The two-pronged test of an effective reliance defense are good faith reliance of

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the defendant upon an expert after full disclosure of relevant facts to that expert. *United States v. Smith, supra; Bursten v. United States*, 5 Cir. 1968, 395 F.2d 976; *United States v. Cox*, 6 Cir. 1965, 348 F.2d 294; *United States v. Baldwin*, 7 Cir. 1962, 307 F.2d 577, cert. denied 1963, 371 U.S. 947, 83 S.Ct. 501, 9 L.Ed.2d 497. Markham withheld from his patent attorneys any disclosure of Klein's participation in the process to be patented except for discussions of Klein's earlier patent and allegations that Klein was a "competitor". Markham permitted his patent attorneys to proceed in ignorance of the facts to make representations which he well knew were both incomplete and untrue.

#### THE CROSS-EXAMINATION OF KLEIN AND CRUTSINGER

We proceed to examine appellant's final contention that the district court erred in limiting his counsel's cross-examination of Klein and Crutsinger.

During the direct examination of Klein, government counsel inquired: "Mr. Klein, let me ask you this. Did you write voluminous letters to about every agency in Washington trying to get some relief from this situation?" Klein answered, "[y]es, I did". The defense later proffered these letters in their entirety as a basis for cross-examination of Klein as to his bias and as showing Markham's lack of criminal intent by demonstrating the adversary nature of the proceedings before the Patent Office. Appellant also urges that the letters were relevant to show that the Patent Office was aware of the dispute concerning the true inventor of the building process, and, at a later date, of the conflicting patent applications. This is evidence, argues appellant, demonstrating that there was no disposition on the part

of the Patent Office to rely on the information in the Dry-Therm patent application and accompanying affidavits, and negating the materiality of the information withheld from the Patent Office by Markham. It was important to Markham's defense, it is asserted, that these matters be fully explored on cross-examination.

Markham's counsel also tried to cross-examine Klein in regard to a complaint about Markham he had filed with the Texas Bar Association Grievance Committee. That Committee had determined that the proper place for Klein's charges was in civil court, not within the grievance process established by the bar. Both of these items, the letters and the evidence relating to Klein's charges filed with the grievance committee, were presented to the court in the form of a proffer of evidence. Counsel for the government and for the defense each argued their position regarding the evidence before the court. The court ruled:

"I deny the Defendant's proffer of evidence. As I have heretofore stated, you can ask Mr. Klein what people he wrote to in regard to Mr. Markham, but we are not going into the details of those letters or the appearance before the grievance committee or anything else".

The court subsequently modified its position and ruled that it would permit Klein to be questioned about the bringing of grievance proceedings against Markham, but not as to the disposition of the matter by the Grievance Committee, or the proceedings before the committee.

[6] The scope of cross-examination is a matter within the trial court's sound discretion. Error will be found only upon a showing of abuse of that discretion. See, *Smith v. Illinois*, 1968, 390

U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956; *United States v. Beasley*, 5 Cir. 1975, 519 F.2d 233; *United States v. James*, 5 Cir. 1975, 510 F.2d 546.

[7] No abuse of the trial court's discretion in this regard is demonstrated. The many letters the defense offered in evidence, written by Klein to various government officials and agencies including among others the Justice Department and the Patent Office, bore in no way upon the issue of Markham's intent, and were without relevance to that issue. The appellant was not a party to any of the correspondence. Klein's bias against Markham was already fully established: the existing enmity between Klein and Markham was apparent from Klein's testimony. The court's supplemental ruling expanded the field of questioning still further, to the outer limits of permissible inquiry.

[8] Appellant's argument that the letters were somehow relevant to show that the Patent Office was fully informed of the disputed inventorship of the building process covered within Dry-Therm's patent application, thereby tending to negate the materiality of Markham's concealment of the true inventor of the building process, is falsely premised. Appellant appears to be under the impression that the government agency involved must be actually deceived to establish a violation of § 1001. This is a misconception. The charge of materiality requires only that the fraud in question have a natural tendency to influence, or be capable of affecting or influencing, a governmental function. The alleged concealment or misrepresentation need not have influenced the actions of the Government agency, and the

<sup>8</sup> These proceedings were instituted by the May 23, 1975 indictment. No question was

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Government agents need not have been actually deceived. See *United States v. McGough*, 5 Cir. 1975, 510 F.2d 598; *United States v. Cole*, 9 Cir. 1972, 469 F.2d 640; *United States v. Jones*, 8 Cir. 1972, 464 F.2d 1118, cert. denied, 409 U.S. 1111, 93 S.Ct. 920, 34 L.Ed.2d 692.

The proceedings before the Dallas Grievance Committee were relevant only to the issue of Klein's bias against Markham. This was shown by the filing of the proceedings, which was admitted under the supplementary ruling. The results of such proceedings are irrelevant to the criminal charges against Markham below, since the Dallas Bar of course could not exonerate him of those charges.

Also raised by appellant is claimed error in sustaining a Government objection to defense counsel's cross-examination of Crutsinger, Moore's associate, who actually drafted the patent application for Markham and Dry-Therm. Appellant's counsel asked this witness:

"The question is this: Did you in any of those conferences with Mr. Markham and in your discussions advising him with respect to the filing of these affidavits find any evidence that he intended to, by trick, scheme or device, to withhold information from the Patent Office?" (Trial Transcript, p. 389)

The court sustained the prosecutor's objection to the question as calling for a conclusion on the part of the witness. Appellant directed the trial court's attention to Rule 704 of the new Federal Rules of Evidence, and he relies upon the Rule here, in support of his contentions of error. Rule 704 provides:<sup>9</sup>

raised by the parties here or below as to the Rules of Evidence being in effect when the

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"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact".

Decision of whether the Rules applied to the trial of these proceedings, Note 5, *supra*, and whether Rule 704 supports the right to put the quoted question, need not detain us. That question was no more than a rephrasing of questions already put by defense counsel to the witness, and answered by him without objection. Crutsinger was asked (Trial Transcript, p. 379) these questions and gave these answers:

"Q. (By Mr. Daniel, defendant's counsel) Now, you had a conference with Mr. Markham throughout the course of the preparation of this patent application, didn't you?

A. Yes.

case was tried in early September, 1975. Public Law 93-595, § 1, January 2, 1975, 88 Stat. 1926, which adopted the Rules of Evidence provided in part: "That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [Jan. 2, 1975]. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to future procedure in actions,

Q. Was there anything he said in any of those conferences with you that gave you any indication that he thought that he was preparing and signing a false patent application?

Q. No."

Regardless of the defense's right *vel non* to seek an answer to the question objected to, it can scarcely be urged that counsel had a right to put repetitious questions to the witness, or that the refusal to permit repetitive questioning of the witness was erroneous. The reach and thrust of the questions was identical. No abuse of discretion occurred when the trial court refused to permit further examination on the subject.

Error is not made out as to the trial court's restrictions on the cross-examination of Klein and Crutsinger.

The judgment below was right. It is AFFIRMED.

*cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.* (Emphasis supplied).

Without the matter being argued, our off-hand view is that the last sentence quoted *supra*, from P.L. 93-595, § 1, rendered the Rules applicable to the trial of this action.

## Appendix 2

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

UNITED STATES OF AMERICA,

v.

E. L. MARKHAM JR.

Criminal No. 3-75-194

ORDER DENYING DEFENDANT'S  
MOTION FOR A NEW TRIAL

The Court having considered the Defendant's Motion for New Trial pursuant to Rule 33 of Federal Rules of Criminal Procedure, it is hereby

ORDERED, ADJUDGED and DECREED that the motion be in all things denied.

ENTERED this 18th day of September, 1975.

/s/ SARAH T. HUGHES

United States District Judge

**Appendix 3**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF TEXAS**  
**DALLAS DIVISION**

UNITED STATES OF AMERICA,

v.

**E. L. MARKHAM JR.**

**Criminal No. 3-75-194**

The Grand Jury charges:

**DEFENDANT**

1. EDWARD L. MARKHAM JR., Esq. is named the defendant.

**BACKGROUND OF OFFENSE CHARGED**

2. In the late 1960's Orlando F. Klein developed a building construction system using steel bar, concrete, corrugated panels, and insulation. In 1968 and 1969, Klein had architectural plans prepared and constructed a house in Grand Prairie, Texas, to demonstrate his system. During the construction of this demonstration house, Klein instructed Edris Roberts, Billy J. Shipley and others how to use Klein's building construction system, and these men paid Klein to teach them the system. Roberts and Shipley learned the system from Klein by oral discussions with him, from inspection of his architectural plans for the house, and by actual demonstration during the building of the house.

3. In September 1969 Klein engaged defendant MARKHAM in the defendant's professional capacity as an attorney. Klein asked the defendant to prepare articles of incorporation for a company to be named "Orlando F. Klein Drycore Systems, Inc." During September of 1969, the defendant acted as Klein's attorney. During this time and later, the defendant was fully informed of the demonstration house at Grand Prairie and of Mr. Klein's intention to file a patent applica-

tion for the system used in building the demonstration house. The defendant visited and inspected the demonstration house in the fall of 1969. Subsequently, the defendant and Klein had a disagreement and the defendant terminated his employment as Klein's attorney.

4. In the spring of 1970, the defendant engaged Howard E. Moore and Gerald Crutsinger, two Dallas patent attorneys, to prepare a patent application. The application described and claimed as improvements in building construction the system used by Klein in building the Grand Prairie demonstration house. The application designated Roberts and Shipley as the only inventors of the improvements; MARKHAM had previously had Roberts and Shipley agree to assign all their interest in inventions to a corporation that MARKHAM controlled. Shipley signed the inventor's oath for the patent application, about knowing or being informed that the application contained claims to the system that Klein had taught him, and that it named Shipley as the first inventor (along with Roberts) of such claims to Klein's system. The defendant then attempted to obtain the signature of Roberts to an inventor's oath for the application also, but he refused to sign.

5. After Roberts refused to sign the patent application, the defendant read the application and signed his own statement under oath as president of the corporation that was assignee of Roberts and Shipley. The statement asserted that the defendant believed Roberts and Shipley to be the original and first inventors of the improvements claimed in the application. Defendant then caused this sworn statement to be filed in the United States Patent Office on or about June 1, 1970.

6. Later, the officials of the Patent Office conducted an investigation into the facts surrounding the filing of the patent application and Robert's refusal to sign it as inventor. During the investigation the defendant caused various misleading statements to be filed and again signed a statement under oath that he believed Shipley and Roberts to be the original inventors of the improvements claimed in the application.

## II. OFFENSE CHARGED

7. Beginning on or about June 1, 1970, and continuing thereafter until on or about October 1973, the defendant MARKHAM knowingly, wilfully, and in violation of Title 18, United States Code, Section 1001, concealed and covered up by a trick, scheme and device material facts relating to the aforesaid patent application (a matter within the jurisdiction of the Patent Office, an agency of the United States).

8. In furtherance and pursuance of such violation, the defendant knew and covered up one or more material facts as set forth more particularly as follows:

(a) Defendant knew and covered up the fact that Edris Roberts and Billy J. Shipley were not the original and first inventors of all of the improvements or subject matter described and claimed in the patent application;

(b) Defendant knew and covered up the fact that Edris Roberts and Billy J. Shipley made no inventive contribution at all to some of the improvements or subject matter described and claimed in the patent application, including that covered by one or more of the following claims: 14, 17, 22 and/or 24;

(c) Defendant knew and covered up the fact that Orlando F. Klein invented, discovered, or knew of the improvements or subject matter claimed in one or more of the claims of the patent application, and Klein did so before Edris Roberts and Billy J. Shipley;

(d) Defendant knew and covered up the fact that Edris Roberts and Billy J. Shipley had worked with Klein and learned of his invention, discovery, or knowledge or such improvements while he was instructing them in constructing the demonstration house in Grand Prairie, Texas.

9. In furtherance and pursuance of such violation, the defendant did, among other things, the following:

(a) On or about June 1, 1970, defendant caused a patent application to be filed in the Patent Office naming Roberts and Shipley as inventors, among other things, of the system Klein had taught them; and defendant did this after he had secured from Roberts and Shipley an assignment of their entire interest in the application to a corporation he controlled.

(b) On or about June 1, 1970, defendant asserted the following in a statement under oath he signed and caused to be filed with the Patent Office in regard to the aforesaid patent application:

\* \* \* I do verily believe the said Edris Roberts to be the original, first and joint inventor with Billy J. Shipley of the improvements in BUILDING CONSTRUCTION described and claimed in the annexed specification; \* \* \*

By these assertions, defendant intended to convey to the Patent Office the impression that Roberts and Shipley were the original and first inventors of all of the improvements claimed in the application.

(c) On or about May 17, 1972, the defendant asserted the following in a statement under oath he signed and caused to be filed with the United States Patent Office in regard to the aforesaid patent application:

My present belief is that EDRIS ROBERTS and BILLY J. SHIPLEY are the original and joint inventors of the subject matter described and claimed in the above indicated application.

By these assertions, defendant intended to convey to the Patent Office the impression that Roberts and Shipley were the original inventors of all the subject matter claimed in the aforesaid patent application;

(d) During the period of time from approximately June 1, 1970, through approximately October 1973, de-

fendant failed to inform the Patent Office of one or more of the facts set forth in paragraph 8 of this indictment.

### III.

#### JURISDICTION AND VENUE

10. The aforesaid offense has been carried out in part within the Dallas Division of the Northern District of Texas and within the jurisdiction of this Court, within five years next preceding the filing of this indictment.

A violation of Title 18, United States Code, Section 1001.

A TRUE BILL.

GLENN LINDON

-----  
Foreman

FRANK D. McCOWN

-----  
Frank D. McCown  
United States Attorney

HARRY KOCH

-----  
Harry Koch, Assistant  
United States Attorney  
Room 16G28, 1100 Commerce  
Dallas, Texas 75202  
Telephone 214-749-3491

WILLIAM E. JACKSON

-----  
William E. Jackson, Attorney  
Department of Justice  
Washington, D. C.

Certified a true copy of an instrument on file in my office on 5-27-75. JOSEPH McELROY, JR., Clerk, U.S. District Court, Northern District of Texas by Barbara Whaley, Deputy.

Supreme Court, U. S.

FILED

DEC 9 1976

MICHAEL RODAK, JR., CLERK

No. 76-564

In the Supreme Court of the United States  
OCTOBER TERM, 1976

E. L. MARKHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,  
*Solicitor General,*

DONALD I. BAKER,  
*Assistant Attorney General,*

BARRY GROSSMAN,  
RON M. LANDSMAN,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-564

E. L. MARKHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1, pp. 1-12) is reported at 537 F. 2d 187.

**JURISDICTION**

The judgment of the court of appeals was entered on August 18, 1976. A petition for rehearing was denied on September 22, 1976. The petition for a writ of certiorari was filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the district court abused its discretion by curtailing the cross-examination of two witnesses.
2. Whether the evidence is sufficient to support the conviction.

3. Whether the indictment informed petitioner of the elements of the offense.
4. Whether there was a variance between the indictment and the proof.
5. Whether 18 U.S.C. 1001 is unconstitutionally vague.

#### STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of covering up and concealing from the Patent Office the true inventor of improvements claimed in a patent application, in violation of 18 U.S.C. 1001. Petitioner was sentenced to two years' probation and fined \$5,000. The court of appeals affirmed. The facts are adequately stated in the court of appeals' opinion (Pet. App. 1, pp. 2-5).

#### ARGUMENT

1. Petitioner argues that the district court abused its discretion by curtailing the cross-examination of two witnesses. These arguments are unsound.

a. The court sustained an objection to the question, asked of a patent attorney, whether the attorney found in his conferences with petitioner "any evidence [that petitioner sought] by trick, scheme, or device, to withhold information from the Patent Office" (Pet. 10). Petitioner argues that the answer to this question would have been admissible under Fed. R. Evid. 704, which permits opinion testimony. Rule 704 does not, however, require the court to admit every proffered opinion. It authorizes the use of opinion testimony only when "otherwise admissible." Admission of expert opinions is subject to the discretion of the trial court, and its rulings are to be sustained unless "manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35. In this case,

as the court of appeals held, the question was repetitious; it was "no more than a rephrasing of questions already put by defense counsel to the witness, and answered by him without objection" (Pet. App. 1, p. 12). Petitioner does not challenge this assessment, and it supports the district court's decision.

b. The trial court also declined to permit extended cross-examination of Orlando Klein, the true inventor, concerning the contents of letters Klein had written to government officials. Petitioner sought to demonstrate Klein's bias against petitioner (Pet. 13), but the court of appeals correctly held that petitioner already had been allowed ample opportunity to show Klein's bias. Indeed, it found that bias had been "fully established," and that the district court had permitted questioning "to the outer limits of permissible inquiry" (Pet. App. 1, p. 11). There is no reason for this Court to review this factual assessment.

2. The evidence, now taken, together with all reasonable inferences, in the light most favorable to the prosecution (*Glasser v. United States*, 315 U.S. 60, 80) is ample to support the conviction. It demonstrated, as the court of appeals showed (Pet. App. 1, pp. 2-5, 8-10), that petitioner, who well knew that Klein invented the "Drycore" system, represented on three occasions to the Patent Office that others had invented the system, and that petitioner willfully concealed or covered-up Klein's role in the invention even after the other purported "inventors" had disclaimed the invention. Petitioner argues (Pet. 13-14) that the court of appeals did not follow precedent set by other panels of that court,<sup>1</sup> but such an intra-

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<sup>1</sup>Petitioner is incorrect in stating that the decision in this case departs from Fifth Circuit law. The one case petitioner cites (Pet. 14) holding that the evidence must exclude every reasonable

circuit conflict would be for that court to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902.

3. Petitioner's contention that the indictment is insufficient does not withstand analysis.<sup>2</sup> The indictment specified that petitioner concealed the material fact that Roberts and Shipley (the asserted inventors) "made no inventive contribution at all to some of the improvements \* \* \* claimed in the patent application, including that covered by one or more of the following claims: 14, 17, 22 and/or 24" (Pet. App. 3, p. 3). This allegation is explicit. No more is needed, as the court of appeals explained (Pet. App. 1, p. 7):

The indictment specified that the building process was developed by Klein, that [petitioner] knew this, and that [petitioner] knowingly and willfully misrepresented to the Patent Office that Shipley and Roberts were the true inventors. The indictment charged much more than that somewhere within the

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hypothesis consistent with innocence was wrongly decided (*Holland v. United States*, 348 U.S. 121, 139-140) and has not been followed. See, e.g., *United States v. Bass*, 490 F. 2d 846, 855 (C.A. 5); *United States v. Warner*, 441 F. 2d 821, 825 (C.A. 5), certiorari denied, 404 U.S. 829; *United States v. Diez*, 515 F. 2d 892, 902 (C.A. 5), certiorari denied, 423 U.S. 1052; *United States v. Parr*, 516 F. 2d 458, 463-464 (C.A. 5); *United States v. Reynolds*, 511 F. 2d 603, 606 (C.A. 5); *United States v. Smith*, 523 F. 2d 771, 774 (C.A. 5), certiorari denied, October 4, 1976, No. 75-1451.

<sup>2</sup>Petitioner appears to argue that the sufficiency of the indictment rests entirely on Paragraph 8 (Pet. 14). However, that paragraph is but one of three substantive paragraphs, each supplying a different part of the charge. Paragraph 7 contains the elements of the offense charged. Paragraph 8 contains the material facts alleged to have been concealed, and Paragraph 9 contains the acts done by petitioner to effectuate the concealment (Pet. App. 3, pp. 3-5). Paragraphs 4 and 5 also contain significant factual averments (Pet. App. 3, p. 2). The validity of the indictment is determined by reading the indictment as a whole. *Dunbar v. United States*, 156 U.S. 185, 190.

lengthy patent application there lay an unidentified idea attributable to Klein which [petitioner] concealed from the government.

4. Petitioner argues that there was a variance between the indictment, which alleged concealment of material facts from the Patent Office, and the proof. Petitioner contends that the government proved false representation (also prohibited by 18 U.S.C. 1001), although he does not say the government failed to prove concealment. In support of this argument, he quotes language from the prosecutor's closing argument and asserts: "Thus did the government base its case on falsity" (Pet. 15).

The argument misunderstands the nature of the crime. As the court of appeals noted, "[c]oncealment and falsity were bound together in the context here" (Pet. App. 1, p. 7). Concealment implies covering up the truth, which can be done by omitting information and by purveying lies or misleading stories. Here petitioner concealed the identity of the true inventor by asserting under oath that two other people were the true inventors. Petitioner cites no facts in the indictment that the government failed to prove. That the government may have proved that part of the concealment was brought about by lying does not show a variance.

5. Finally, petitioner's contention that 18 U.S.C. 1001 is unconstitutionally vague (Pet. 16) is both untimely and unsound. The issue was not raised below, and there is no reason to consider it now. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2. Moreover, the argument is insubstantial. Cf. *United States v. Powell*, 423 U.S. 87. Section 1001 proscribes activities long held to be culpable, in terms heavy with common law elaboration. Cf. *Rose v. Locke*, 423 U.S. 48. It makes illegal the knowing and willful concealment of material facts

in dealings with government agencies. Its requirement of specific intent relieves the statute of any possible uncertainty. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163; *Screws v. United States*, 325 U.S. 91, 101-107.

#### **CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

**ROBERT H. BORK,**  
*Solicitor General.*

**DONALD I. BAKER,**  
*Assistant Attorney General.*

**BARRY GROSSMAN,**  
**RON M. LANDSMAN,**  
*Attorneys.*

DECEMBER 1976.